

Human Rights

Respect · protect · promote

Guide: Human rights in
decision making
*A guide for Queensland
Government staff*

Version 4: January 2020



Queensland
Government

Guide: Human rights in decision making

Who is this guide for?

This guide is for Queensland Government employees. It explains how to think about human rights when you make decisions at work.

Other guides that may be helpful in your work:

- *Nature and scope of the protected human rights*—this guide provides detailed information about each of the protected human rights. Learning more about the rights will help you identify where they are engaged in your work.
- *When human rights may be limited*—this guide provides a list of questions to ask if you are thinking about limiting someone’s human rights.

You can find these guides at www.forgov.qld.gov.au/humanrights.

Why do I need this guide?

The *Human Rights Act 2019* (the Act) is a law that applies to anyone doing work for the Queensland Government. It applies to people working for a government department (e.g. Queensland Health); a local government (e.g. Cairns Regional Council); or a court or tribunal (if you make administrative decisions).

The Act can also apply to organisations or people outside of the Queensland Government who are doing government work. For example, bus drivers who work for a private company that runs a public bus route, or disability workers working for a non-government organisation. If you’re not sure whether the Act applies to you, ask your manager.

The Queensland Government employs people who provide services to the public (e.g. nurses, teachers, fire fighters, police officers, project officers, bailiffs, and administrative staff) as well as services within government (e.g. policy officers, human resources managers, corporate services officers, administrative officers, and legal officers). Whether you work directly with the public or not, you have to think about human rights when you make decisions.

The Act shows you how to act and make decisions in a way that is consistent with human rights law. This guide explains how to apply human rights in your work.

What does the Act do?

The Act aims to build a culture in the Queensland Government that respects, protects, and promotes human rights.¹ It puts people first by making sure that we think about human rights when we make decisions and deliver government services.

Sometimes our work protects or promotes human rights; sometimes it limits human rights. An action or decision limits a human right if it stops a person from enjoying their rights or changes the way a person enjoys their rights. Sometimes one person's human rights need to be balanced against the rights of another person or group. For example, everyone in Queensland has the right to freedom of expression—people can have their own opinion and share their ideas. Everyone in Queensland also has the right to recognition and equality before the law—including protection from discrimination. In some situations, an individual's right to freedom of expression might need to be limited to protect another person from discrimination.

The Act recognises that sometimes we have to limit human rights, but it shows us how to do this in a fair and balanced way.

Queensland Government employees have to do two things:

1. think about human rights when we make decisions
2. act and made decisions in a way that is consistent with human rights law.²

Thinking about human rights when you make decisions is known as a procedural obligation—it is about the process you follow to make a decision. This means that you have to think about human rights *before* you make a decision that might impact people's rights. This includes considering:

- how the decision will work in practice
- if there are any guidelines, policies, or procedures designed to reduce the effect of a decision
- if those guidelines are effective.

The standard expected—how thorough this process needs to be—will be different depending on:

- who is making the decision
- what rights are affected
- the vulnerability of the people affected by the decision.

For example, if you are making a decision that involves a significant limitation on the human rights of a vulnerable group (such as people with impaired capacity who are involuntarily detained), the standard required to meet your obligations under the Act will be high.

¹ You can find this in section 3 of the Act.

² You can find this in section 58 of the Act.

If you are making a decision that involves a smaller limitation on a human right in a different context (such as asking people to use a footpath on the other side of the road when work is being done to fix a closed footpath), you still need to think about human rights, but the standard will be lower.

You have to think about human rights even if you can't identify a particular person who will be affected by the act or decision. It is enough for there to be a potential impact on human rights for a group of people.

Case study: Making a decision about using pepper spray on young people in detention

Certain Children (No 2) [2017] VSC 251

This case study comes from a Victorian court case about human rights for young people in detention. Part of the court case was about when Oleoresin Capsicum (pepper) spray could be used on young people in detention.

Thinking about human rights when you make a decision includes considering how decisions will work in practice. The judge explained that the decision maker had to think about the circumstances in which the spray would be used, including whether it could be used against the guidelines (e.g. as a reflex response to a violent situation, where the corrections officer might have to respond quickly to a situation).

The judge also said that the decision maker should balance the benefits of preventing violence within youth justice facilities against the possible effect of using pepper spray on bystanders who might not be directly involved in a violent situation.

Acting and making decisions in a way that is consistent with human rights law is known as a substantive obligation—it is about the actual decision or action. This means that your behaviour—the way you act and the decision you make—has to be compatible with human rights.³

The way you act can mean a failure to act (not doing something when you could or should have) or a proposal to act.

For example, someone goes to a court asking for help to find the correct forms for their case. This person speaks English as a second language and is having trouble understanding the court process. The court staff could notice this and **ask** the person if they would like to use an interpreter. This is a proposal to act. Or, the court staff might notice someone is having trouble understanding and **not ask** the person if they need an interpreter. This could be a failure to act.

³ *Compatible with human rights* are words used throughout the Act that have a special legal meaning. This guide explains that meaning. You can also find the meaning in section 8 of the Act, which also refers to section 13.

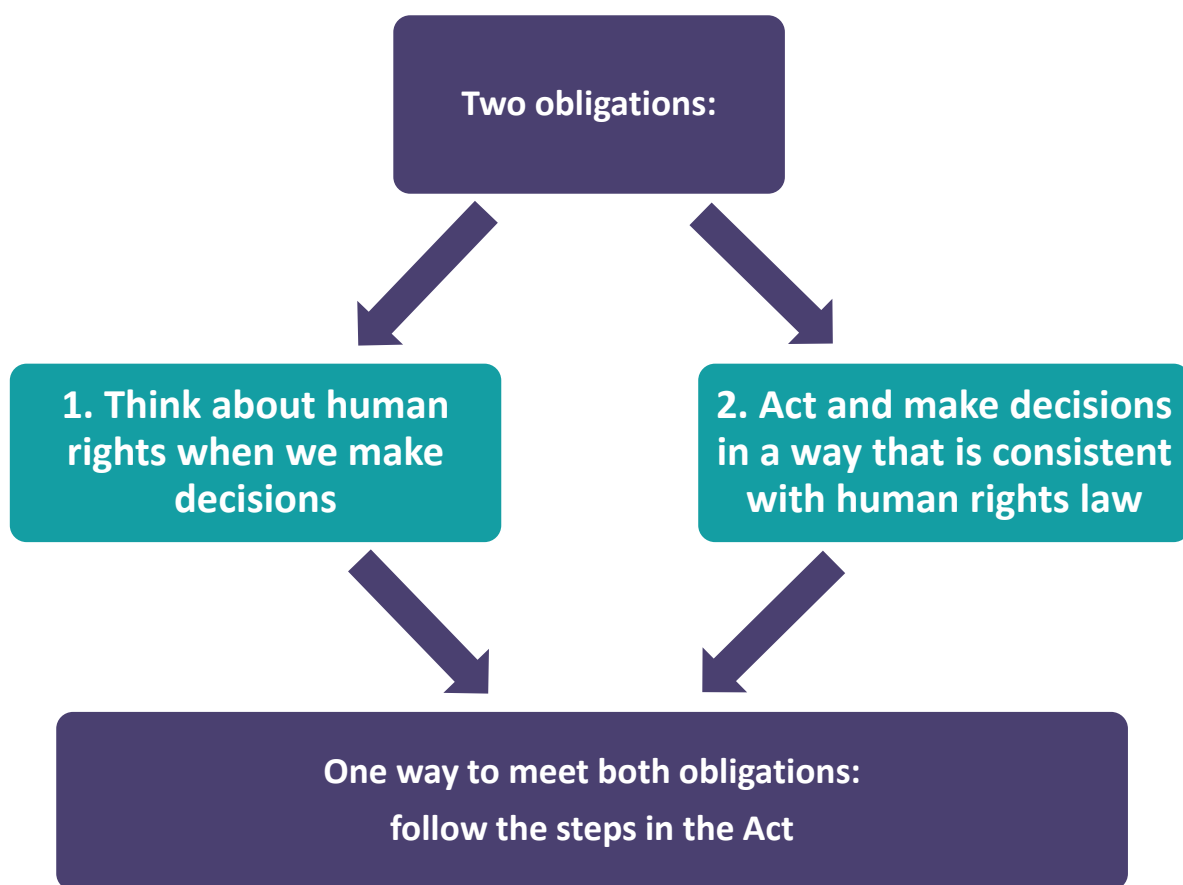


How do I make decisions in a way that is consistent with human rights law?

As Queensland Government employees, we have to think about human rights when we make decisions, and then act and make decisions in a way that is consistent with human rights law.

The Act sets out the steps we should follow to meet both of those obligations.⁴

In the next section, these steps are set out with some examples.



⁴ You can find these steps in section 13 of the Act.

The human rights roadmap: Limiting human rights in a fair and balanced way

Because the Queensland Government balances so many competing rights and interests, sometimes the decisions you make at work will limit individuals' human rights.

Follow these steps to help you think about human rights and understand whether your decision is fair and balanced:

1. What human rights are affected?
2. Will human rights be limited by this decision?
3. Does the law let me limit human rights?
4. Can I show that there is a good reason for the limitation? Can I show that the limitation is fair and reasonable?
5. Is the decision consistent with human rights law?

Step 1: What human rights are affected?

What human rights are affected by the decision? Include rights that you are protecting, promoting, or limiting. If no human rights are affected, you don't have to go through the rest of the steps.

Case study: Using an interpreter

A front counter employee is serving a member of the public who has difficulty communicating in English. They're having trouble filling in a form and don't seem to understand what the employee is saying. The employee works under an agency policy that says the form has to be completed, and it's only available in English. The employee has to decide what to do.

What human rights could be affected by the decision?

This scenario could engage the following rights:

- recognition and equality before the law—everyone should be able to use a government service, even if they have different needs, can't read or write, speak another language, have a disability, or have anything else that may stop them using the service in the same way as everyone else.
- freedom of expression—everyone can ask for, express, and share information, which includes requesting information from the Government.
- cultural rights—everyone can use their language.
- privacy and reputation—everyone has the right to keep their life, body, family, home, correspondence, and information private.



Step 2: Will human rights be limited by this decision?

How will your decision limit the human right? To understand this question, it will help to know what the right protects. You can visit the [Queensland Human Rights Commission website](#) or see our guide [Nature and scope of the protected human rights](#) for more information about each right. An action or decision limits a human right if it stops a person from enjoying their rights or changes the way a person enjoys their rights. If you aren't limiting any human rights, you don't need to go through the rest of the steps.

Case study: Using an interpreter

Are human rights limited? If the person can't use a government service or get the information they need, this could limit their rights to equality before the law and freedom of expression, and their right to use their language. If the employee asks someone to help the person fill out the form, this could limit the person's right to privacy.

Step 3: Does the law let me limit human rights?

There has to be a law or regulation that allows you to limit human rights. If there is no law or regulation that says you can make this decision, you may not be able to limit human rights.

Case study: Using an interpreter

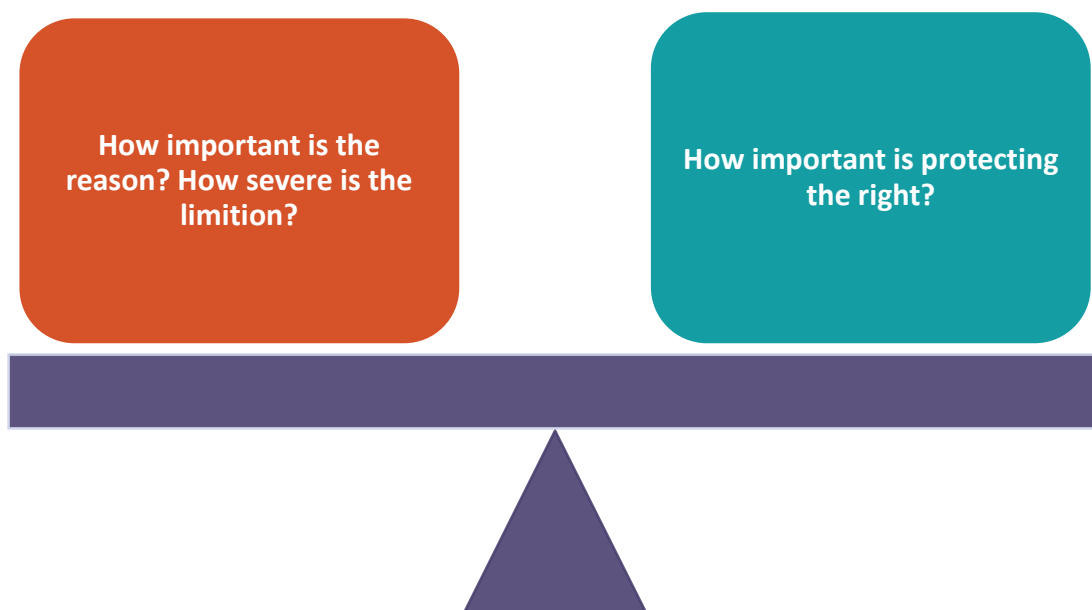
Is there a law that allows the employee to make this decision that might limit human rights?

Many laws in Queensland provide for interpreters to be used in different types of work and interactions between individuals and Government agencies and services. The *Multicultural Recognition Act 2016* establishes that equal rights and equitable access to government services build a fair Queensland. The *Human Rights Act 2019* says that people have the right to use their language, and that everyone should be treated fairly and be able to use a government service. The Queensland Government has a *Queensland Language Services Policy*, which reflects the Government's commitment to addressing language barriers. Queensland Government employees work under laws and policies that allow them to make decisions, and policies that tell them how and when to use interpreters at work.

Step 4: Can I show that there is a good reason for the limitation? Can I show that the limitation is fair and reasonable?

If we limit human rights, we have to show that there was a good reason, and that it was fair. When your actions or decisions will limit an individual's human rights, think about these questions to decide if the limitation is fair and for a good reason:

- a) What is the human right trying to protect?
- b) Why do we need to limit the right?
- c) What is the purpose of this action, decision, or policy? Does it protect people's freedom, dignity, and equality?
- d) Can I show the connection between the limitation and the purpose? Will what I am doing actually achieve what I am trying to do?
- e) Can I achieve the purpose in a less restrictive way? Is there another option available to me?
- f) Is there a fair balance between the reason for limiting the right and the importance of protecting the right?



Case study: Using an interpreter

*Can the employee show that there is a good reason for limiting the person's rights?
Is the limitation fair?*

For example, think about the right to privacy. The right to privacy means that people have the right to keep their life, body, family, home, correspondence, and information private. If the employee organises an interpreter, the interpreter could learn private information about the person, which could limit the person's right to privacy.

The purpose for limiting the right to privacy in this way is to allow the person to use a government service, to access information they need, and to use their language. This purpose promotes dignity and equality for all people.

Using an interpreter might limit the person's right to privacy, but it could also help them fill in the form and communicate with the employee to use the service. Less restrictive options might include asking the person if they want an interpreter, or making sure to use an official interpreter who has to follow rules about confidentiality.

Maybe the person doesn't want an interpreter, or says they know someone who will help them fill in the form. Maybe they tell the employee they have an appointment with a support service where they will get help. The employee would think about all of these things when they make a decision.

Every decision will have a different context, but decision makers have to think about how a person's human rights will be affected by a decision, and how to balance competing rights and other considerations.

Step 5: Is the decision consistent with human rights law?

If you can show that your decision limits rights in a way that is fair and reasonable, then your decision **is consistent with human rights law**.

If you can't show that your decision limits rights in a way that is fair and reasonable, then your decision **is not consistent with human rights law**. You will need to go back and see if you can make the decision differently. Is there another way to achieve your purpose?



Are there any situations when I don't have to think about human rights?

There are certain situations where you don't have to think about human rights when you make decisions in your work. These are limited circumstances that are set out in the Act:⁵

- you couldn't have acted differently or made a different decision
- you were making a decision as part of a religious body
- you were making a private decision.

Where you couldn't have acted differently or made a different decision

You don't have to think about human rights if there is a law that tells you to act a certain way, and doesn't give you any choice (discretion) to make a different decision. This could be a Commonwealth or state law.

For example, if someone wants to start a business selling used cars and is applying for a motor dealer licence, they have to be 18 years old and pass the required training courses. These are mandatory conditions listed in the law that regulates motor dealer licences.⁶ If someone is only 17 years old and applies for a licence, the decision maker can't give them a licence. Because the mandatory conditions aren't met, a licence can't be issued. The law doesn't allow the decision maker to make any other decision, so they don't have to think about human rights when they make the decision.

The obligations under the Act don't override other laws that tell you to act or make a decision in a certain way. You have to keep following the laws that tell you how to do your job, even if it is inconsistent with human rights law.

It is important to know that this exemption uses the term *reasonably*. This means that the important part is not whether the law required a specific action, but whether you could not have *reasonably* acted differently or made a different decision that did not breach human rights. This will be particularly relevant in circumstances where the decision maker has some discretion.

It is unlikely to be *reasonable* to limit human rights if the discretion lets you act or make a decision that does not limit human rights.

⁵ You can find these exemptions in section 58 of the Act.

⁶ *Motor Dealers and Chattel Auctioneers Act 2014* (s32).



Where you were making a decision as part of a religious body

This exemption is about organisations that have been established for a religious purpose.

The Act says that if you are working for a religious organisation then you don't have to think about human rights if:

- you are making a decision in line with the doctrine of the religion concerned
- and you have to make your decision a certain way to avoid offending the religious sensitivities of the people of that religion.

This is consistent with the religious exemption in the *Anti-Discrimination Act 1991*.

Where you were making a private decision

You don't have to think about human rights if you are making a private decision. This includes things done outside of work, such as personal decisions about your own private life.

What happens if I don't think about human rights?

You need to think about human rights in the decisions you make at work. It is unlawful to act and make decisions in a way that is not consistent with human rights law. If someone thinks their human rights have been breached, they can complain to the agency (e.g. a Queensland Government Department).

If after 45 business days after making the complaint to the agency the person doesn't get a response, or thinks the response is inadequate, they can complain to the Queensland Human Rights Commission. The Queensland Human Rights Commission provides an accessible and independent avenue for members of the community to raise human rights concerns and reach a practical resolution. Read more about this at www.qhrc.qld.gov.au.

Someone with a human rights complaint can't go to a court or tribunal unless they have another claim (e.g. an anti-discrimination claim). They can attach a human rights complaint to that claim and go to a court or tribunal.

You can find more information about human rights in Queensland at www.forgov.qld.gov.au/humanrights

